Supreme Court, U.S.
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No. 01-373

In the Supreme Court of the United States

JOHN E. POTTER, POSTMASTER GENERAL,
Petitioner,

v.

LISA L. FITZGERALD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly apply the "continuing violation" doctrine in considering alleged discriminatory conduct occurring outside of the 45 day limitation period prescribed by 42 USC 2000e-16 (b) and 29 CFR 1614.105 (a)

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

From 1986 through Sept. 25 1997, plaintiff Lisa Fitzgerald was employed as a City Letter Carrier Grade 5 by the United States Postal Service at the Lake Placid Post Office. After August 1994, her immediate supervisor was a man named Timothy Gerling. Ms. Fitzgerald alleges that she was subjected to constant and unrelenting harassment from Mr. Gerling, which resulted in hostile work environment sexual harassment.

From August 1994 through April 1995, Mr.Gerling's harassment was in the form of unwanted sexual advances, including a boast/threat to "father Ms. Fitzgerald's first child". (Petitioner's Appendix, 3a-4a) After these advances apparently ceased in April 1995, Mr. Gerling engaged in an escalating pattern of harassment in the form of discriminatory assignments, "counseling", excessive micromanagement, and verbal and physical intimidation. This harassment culminated in an incident on September 25, 1997, where Ms. Fitzgerald was subjected to a tirade of profanity and finger-pointing. Ms. Fitzgerald walked out of the meeting, and was unable to return to her duties as a postal employee. She alleges that the events of September 25 1997, when considered in the context of the preceeding 2 1/2 years of harassment, were sufficiently severe to constitute a "constructive discharge". Shortly after leaving work, Ms. Fitzgerald was diagnosed as suffering from major depression and post-traumatic stress disorder. She lost 25 percent of her body weight, and suffered from sleeplessness, anorexia and constant nightmares.

On October 24, 1997, Ms. Fitzgerald contacted a Postal Service EEO counselor. Pursuant to 29 CFR 1614.105,

alleged discriminatory conduct that occurred within 45 days of these initial counseling session is deemed to be timely. Therefore, absent the application of the continuing violation doctrine, Ms. Fitzgerald would be limited to complaining about discriminatory conduct that occurred within 45 days of October 24 1997, or actions which occurred after September 9, 1997.

In her complaint, Ms. Fitzgerald asserted claims based on hostile work environment sexual harassment, disparate treatment, and retaliation. The District Court dismissed all of her claims as untimely. The court refused to apply the "continuing violation" doctrine, because it interpreted Second Circuit case law as holding that the continuing violation doctrine only applies to specific "policies or mechanisms". (Petitioner's Appendix 79a-81a) The court rejected plaintiff's claim of constructive discharge because the September 25,-1997 incident was insufficient, by itself, to render plaintiff's working conditions "so intolerable that [she] was forced into an involuntary resignation", quoting Lopez v. SB Thomas Inc., 831 F.2d 1184, 1188 (2d Cir.1987). (Petitioner's Appendix 86a)

B. THE SECOND CIRCUIT'S APPLICATION OF THE CONTINUING VIOLATION DOCTRINE

On appeal, the Second Circuit affirmed the dismissal of Ms. Fitzgerald's claims of disparate treatment and retaliation, but divided Ms. Fitzgerald's claims of hostile work environment sexual harassment into "Phase 1", pertaining to Mr. Gerling's sexual advances in 1994 and 1995, and "Phase 2", consisting of Mr. Gerling's conduct against Ms. Fitzgerald after she rejected his advances, from

1995 through September 25 1997. The Second Circuit found that the continuing violation theory did not apply to Phase 1, inasmuch as the allegations of abusive treatment that occurred within the 45 day period in September 1997 could not be considered to be a continuation of the sexual advances that had been made in 1994 and 1995.

In contrast, the court found that Ms. Fitzgerald's "sworn factual allegations of Gerling's constant stream of unjustified criticisms of her work described specific, related instances of harassment adequate to depict a continuity of allegedly unlawful conduct." (Petitioner's Appendix 38a). "[T]hus, although the final abusive incident on September 25, 1997 was separated from Gerling's final sexual advances by a gap of nearly 2 1/2 years, Fitzgerald's assertions plainly alleged that there was no interruption in the allegedly unwarranted abuse to which she was subjected during that 2 1/2 year Phase 2 period." (Petitioner's Appendix 31a).

The Second Circuit also noted that it was inappropriate for the District Court to focus solely on the September 25, 1997 incident, because Ms. Fitzgerald had alleged that she had been subject to abuse every day, and even the Postal Service had acknowledged that "more than one of the acts fell within the regulatory 45 day limitation." (Petitioner's Appendix 36a-37a).

Finally, the Second Circuit noted that the District Court's dismissal of the constructive discharge claim was based upon its rejection of the continuing violation theory, and held: "the jury could permissively find that as a result of the cumulative effect of his constant abuse and unfair criticism-especially if its severity was escalating, as Fitzgerald asserted-a reasonable person on September 25, 1997, would have found working conditions intolerable." (Petitioner's

Appendix 48a). In other words, a factual question existed with respect to the events that occurred outside of the limitations period, and with respect to a "reasonable person's" perceptions of the September 25 incident.

ARGUMENT

I THERE IS NO BASIS TO HOLD THIS CASE PENDING THE COURT'S DECISION IN NATIONAL PASSENGER RAILROAD CORPORATION v. MORGAN, CASE NO. 00-1614.

A. The interpretation of the continuing violation doctrine at issue in Morgan does not affect the instant case.

In this case, the United States acknowledges that "the decision of the Court of Appeals in this case does not independently warrant plenary review if the Court issues a decision on the merits in Morgan" [National Passenger Railroad Corporation v. Morgan, Case No. 00-1614] (Petition 10) but merely seeks to have this case held for the Court's ultimate decision in Morgan. The instant petition for a writ of certiorari is therefore solely based upon an argument that the Court's decision in Morgan might affect the instant case. However, Morgan is both procedurally and factually distinguishable from Fitzgerald. Furthermore, while Morgan requires the determination of unresolved legal issues pertaining to the question of when a prospective plaintiff should be "on notice" of a potential violation of Title VII, the instant case merely involves the application of well settled law to unique factual circumstances.

The continuing violation doctrine has been consistently recognized by the Court in discrimination cases (cf. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Franks v. Bowman Transportation Co. 424 U.S. 747 (1976), Teamsters v. United States, 431 U.S. 324 (1977), Zipes v. TWA, 445 U.S. 385 (1982), and Bazemore v. Friday, 478 U.S. 385 (1986). In its *amicus* brief in Morgan, the United States acknowledges the viability of the "traditional continuing violation doctrine"[1,2], but nevertheless argues that this doctrine limits recovery for injuries that occurred prior to the limitation. However, this interpretation, even if ultimately credited by the Court, will not affect the instant case, where Plaintiff is seeking to recover for damages as a result of a constructive discharge that occurred within the limitations period, and where her claims are based upon the cumulative effects of a hostile work environment that continued unabated into the limitations period. This is fundamentally different than the United States' characterization of the issue in Morgan, involving the question of whether a plaintiff can use "pre-limitation acts" as "an independent basis for liability". (Petition 10)

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[1] In this case, the United States describes the "traditional rule" as permitting "a plaintiff" to "recover for a violation that occurs within the limitations period, even if the plaintiff knew or should have known of the illegal course of conduct much earlier and outside the limitations period. But the plaintiff may not recover for violations outside the limitations period, even if they are related to the violations within the period." (Petition 10)

[2] Brief for the United States as *amicus curiae* supporting petitioner in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, p 9. This brief was apparently written by virtually the same attorneys who wrote the petition for writ of certiorari in the instant case.

In Morgan, the Ninth Circuit declined to "adopt a strict notice requirement as the litmus test for application of the continuing violation doctrine", 232 F.3d 1008, 1015 (9th Cir. 2000), and specifically rejected the approach to continuing violation doctrine cases that had been adopted in Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983) and Galloway v. General Motors, 78 F.3d 1164 (7th Cir. 1996). In Berry, the Fifth Circuit applied a multifactor test to determine whether discrete acts of harassment were sufficiently closely related to satisfy a continuing violation theory. In Galloway, the Seventh Circuit noted "we do not want to encourage premature or precipitate litigation. If the victim of sexual harassment sues as soon as the harassment becomes sufficiently palpable that a reasonable person would realize that she had a substantial claim under Title VII, then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable." (78 F.3d at 1166).[3]

Regardless of whether the standards of Galloway or Berry on the one hand, or the more liberal approach utilized by the Ninth Circuit in Morgan and in Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999) and Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998), Ms. Fitzgerald would have been permitted to proceed under a continuing violation theory. Furthermore, it is irrelevant whether Ms. Fitzgerald should have been on notice of the violation, or whether a reasonable person in Ms. Fitzgerald's position would have been on notice of the violation. The violations of law of

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[3] Respondent Fitzgerald cited both Berry and Galloway in her brief to the Second Circuit, and argued that the tests used in both of these cases would support the application of the continuing violations doctrine to her case.

which she complains: the maintenance of hostile work environment sexual harassment, obviously were alleged to be continuing, and obviously continued into the limitations period. In such a case, as the United States notes in its *amicus* brief in Morgan, "a claimant's prior notice of an ongoing Title VII violation does not deprive the claimant of the ability to recover for violations that continue into the charge filing period."[4]

B. The issues pertaining to the application of the continuing violation doctrine in this case are primarily factual.

The question of whether the level of harassment is sufficiently severe to put a reasonable person on notice of the need to complain is a factual question that must, in the context of a motion for summary judgment, be deemed to be resolved in favor of the Plaintiff, the nonmoving party. That is precisely how the Second Circuit approached Ms. Fitzgerald's claim, holding: "a fact finder may consider her evidence that Gerling subjected her to unfair harassment every day during that two and a half year period, as well as her assertion that his harassment during that period escalated. . . . Although Ms. Fitzgerald's failure to seek administrative assistance during that period is a fact that plainly may be considered in weighing her testimony that she was subjected to harassment that was so constant and so abusive as to materially affect her

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[4] Brief for the United States as *amicus curiae* supporting petitioner in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, p. 11. This brief was apparently written by virtually the same attorneys who wrote the petition for writ of certiorari in the instant case.

working conditions, the weighing of the evidence and the decision as to which of competing inferences is to be drawn is solely within the province of the fact finder." (Petitioner's Appendix 37a)[5]

Ms. Fitzgerald alleged that she had been subjected to continuous harassment for two and a half years, and that this harassment continued into the limitations period. This hostile work environment culminated in her alleged "constructive discharge" on September 25, 1997. This is factually distinguishable from Morgan, where the plaintiff's claims primarily consist of claims arising out of a history of specific acts of discrimination and unequal treatment. The claims of racially-based hostile work environment in Morgan are a small part of the case, and there is no allegation that the hostile environment continually escalated to a constructive discharge.

C. The Second Circuit holding does not raise any legal issues warranting review by this Court.

In holding that Ms. Fitzgerald's claims were actionable under a theory of continuing violation, the Second Circuit did not establish any new law, nor did it make any determination as to what level of notice would be required. Rather, the court merely applied the traditional continuing violation doctrine to hold that a court could consider the events that occurred prior to September 9, 1997 in

[5] In Morgan, the Ninth Circuit's decision was rendered upon an appeal from a judgment after trial; in contrast, in this case, the District Court granted a motion for summary judgment before the commencement of discovery.

determining whether a hostile work environment had been created and maintained during the limitations period. Because this decision did not result in any deviation from established principles of the continuing violation doctrine, it was not necessary for the Second Circuit to consider the level of notice that might have been required, nor was it necessary to discuss, let alone distinguish, the decisions of sister circuits such as Berry and Galloway.

The Second Circuit reversed the District Court because of "doctrinal, factual and procedural difficulties" with the District Court's decision. (Petitioner's Appendix 28a). The "doctrinal" issue concerned the applicability of the continuing violation doctrine to cases "where discrimination is accomplished through a specific official's policy or mechanisms. . ." Butts v. City of New York, 990 F.2d 1397, 1404 (2d Cir. 1993), see also Lambert v. Genessee Hospital, 10 F.3d 46, 53, (2d Cir.1993). The issue of whether such a restriction is an appropriate application of the continuing violation doctrine was the critical issue before the Second Circuit[6]. However, this issue is not the basis for the instant petition for a writ of certiorari, nor does the Justice Department suggest that this issue should be considered by the United States Supreme Court.

Accordingly, the basis of the Second Circuit's ruling is not likely to be affected by the Court's ultimate holding in Morgan, and there are no grounds to hold the petition for a writ of certiorari pending the determination in Morgan.

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[6] The Second Circuit law prior to Fitzgerald, apparently requiring the documentation of a discriminatory "policy", was criticized for adding "an inappropriate extra element to those seeking to prove serial violations", Spriggs, Kent, Representing Plaintiffs in Title VII actions, 2d Ed, Vol.1 p. 9-22.

II THE LEGAL THEORIES ADVANCED BY THE UNITED STATES IN MORGAN ARE INAPPOSITE TO THE INSTANT CASE.

In its *amicus curiae* brief in Morgan, the United States makes three principal arguments: 1) the continuing violation doctrine permits a plaintiff to recover for a violation that occurs within the limitation period even if the Plaintiff knew of the violation earlier, but may not recover for a violation that occurred outside the limitations period, 2) Title VII is consistent with the traditional continuing violations doctrine, even though backpay is limited to the 300 day limitation period, rather than the two-year limitation for backpay specified in 42 USC 2000e-5 (g) (1), and 3) contrary to the Ninth Circuit opinion in Morgan, the Plaintiff may not recover for alleged violations that occurred outside of the 300 day limitations period, even though those actions may be relevant evidence about events that occurred within the limitations period (See Summary of Argument, brief of the United States *amicus curiae* in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614, pp. 9-10).

Even if the Court should accept the United States' arguments in Morgan, such a ruling will not affect Ms. Fitzgerald's claims. Ms. Fitzgerald asserts damages based upon her constructive discharge, an event that clearly occurred within the limitations period. The District Court, in dismissing her claim, viewed the events of September 27, 1997 as an isolated event, because the District Court declined to consider the preceding two and a half years as part of the same pattern of discrimination. The Second Circuit reversed, holding that the events that had occurred, could when viewed together, constitute a "policy" and that the continuing

violation doctrine would apply to such a "policy". This holding is irrelevant to the argument of the United States that no damages can be recovered for pre-limitations period conduct.

Ms. Fitzgerald does not assert a claim for backpay outside of the relevant limitation period. Her claim for backpay after her constructive discharge on September 25, 1997, is, of course, within the limitations period.

Ms. Fitzgerald does have a claim for compensatory damages, including emotional trauma, that result from the maintenance of a hostile work environment. It is by no means clear that United States intends its theory to apply to hostile work environment claims that "usually involve a continuing violation", Waltman v. International Paper Corp., 875 F.2d 468, 476 (8th Cir. 1986) and "turn on the existence of a continuing violation, rather than any individual offensive act." Brown v. Middaugh, 41 F.Supp. 2d 172, 182 (N.D.N.Y. 1999). However, even if a distinction can be drawn between damages for a hostile work environment that occurred within and without the limitation period, a factual question would still exist as to when Ms. Fitzgerald was properly on notice that the hostile environment was actionable, and, for what period of time, if any, she should be precluded from asserting a claim for damages. Regardless of how the Court determines the applicable law with respect to claims for hostile work environment that occurred prior to the limitations period, Ms. Fitzgerald will be able to assert a claim for damages for the hostile work environment that occurred within the limitations period. Therefore, Ms. Fitzgerald's claim for hostile work environment will not be affected, either adversely or beneficially, by the Court's treatment of the arguments advanced by the United States in Morgan.

CONCLUSION

The petition for a writ of certiorari should be denied outright, and not be held pending this Court's decision in National Railroad Passenger Corporation v. Morgan, Case No. 00-1614.

Respectfully submitted,

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Lisa Fitzgerald